

Before the  
Administrative Hearing Commission  
State of Missouri

NEW GARDEN RESTAURANT, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 14-1844 RS
	)	
DIRECTOR OF REVENUE,	)	
	)	
Respondent.	)	

**DECISION**

We grant the motion for involuntary dismissal filed by the Director of Revenue (“the Director”).

**Procedure**

On November 19, 2014, New Garden Restaurant, Inc. (“New Garden”) filed a complaint. On December 4, 2014, the Director filed a motion for involuntary dismissal alleging that we do not have jurisdiction to hear New Garden’s complaint. New Garden responded to the motion on December 16, 2014. The Director filed a reply on December 19, 2014. New Garden filed a sur-reply on December 29, 2014.

On January 5, 2015, New Garden filed a motion asking this Commission to extend the statutory time in which we are allowed to exercise jurisdiction in the underlying appeal. The motion is accompanied by 47 pages of material that had previously been filed and considered in reference to the motion to dismiss. In that the analysis as to our ability to grant the relief sought by the Director (dismissal) and by New Garden (extension of the time to appeal the Director’s decision) overlaps, we decide the motions together.

Because the Director's motion to dismiss contains matters outside the pleadings, we consider it a motion for summary decision. 1 CSR 15-3.436(4)(A).<sup>1</sup> Pursuant to 1 CSR 15-3.446(6)(A), we may decide a motion for summary decision if a party establishes facts that entitle that party to a favorable decision and no party genuinely disputes such facts. Those facts may be established by stipulation, pleading of the adverse party, or other evidence admissible under the law. 1 CSR 15-3.446(6)(B). The Director's motion is accompanied by a custodian of records affidavit with certified records of the Department of Revenue ("the Department") attached. The reply is accompanied by three affidavits and various attachments. New Gardens also filed affidavits, as we discuss later, but none of its evidence controverts the material facts, which we set forth below.

### **Findings of Fact**

1. On September 5, 2014, the Director sent, by certified mail, 34 Assessments of Unpaid Sales Tax to New Garden. The assessments were for sales tax, additions to tax, and statutory interest for consecutive monthly periods from August 1, 2011 through May 31, 2014.

2. The assessments were mailed to New Garden's address of record, 6048 NW Barry Road, Kansas City, Missouri 64154, which is the address used by Department representatives throughout 2013 and 2014.

3. Each assessment states it is a final decision of the Director and contains instructions for filing an appeal:

If you are adversely affected by this decision, you may appeal to the Administrative hearing Commission. To appeal, you must file a petition with the Commission within sixty (60) days after the date this decision was mailed or the date it was delivered, whichever date was earlier. If any such petition is sent by registered or certified mail, it will be deemed filed on the date it is mailed; if it is sent by any other method other than [sic] registered

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<sup>1</sup> All references to the CSR are to the Missouri Code of State Regulations as current with amendments, included in the Missouri Register through the most recent update.

or certified mail, it will be deemed filed on the date it is received by the Commission.

**Send appeals to the Administrative Hearing Commission, Box 1557, Jefferson City, MO 65102-1557.**

4. Each assessment is also accompanied by a document entitled “Taxpayer Choices Upon Receipt of Assessment,” which includes options to pay the assessment (with or without filing a protest), to file an appeal with this Commission within 60 days and/or to seek informal review of any assessment by the Director.

5. The “Taxpayer Choices” document states:

You may ask for a hearing before the Administrative Hearing Commission. To do so, you must file a petition with the Commission within sixty (60) days after the date this decision was mailed or the date it was delivered, whichever date was earlier. If any such petition is sent by registered or certified mail, it will be deemed filed on the date it is mailed. If it is sent by any method other than registered or certified mail, it will be deemed filed on the date it is received by the Commission, Section 621.050, RSMo . . . Additional details concerning the filing of a petition may be obtained from the Administrative Hearing Commission, P.O. box 1557, Jefferson City, Missouri 65102-1557.

In the middle of each statement of remedies is the following:

**CAUTION: A request for an Informal Review does not extend of [sic] affect the sixty (60) days you are allowed to file an appeal with the Administrative Hearing Commission. Failure to file with the Commission within the sixty (60) days will result in the assessment being final and all amounts assessed being due.**

6. On October 9, 2014, New Garden’s attorney e-mailed the Department auditor to ask about “a deadline which is approaching.” Respondent’s Reply to Petitioner’s Response to Respondent’s Motion for Involuntary Dismissal, Ex. A. The auditor replied by referring the attorney to the “Missouri Taxpayer Bill of Rights,” which she attached to her e-mail. That document instructs taxpayers that they may seek a review of their case “by the Administrative Hearing Commission (AHC), which is not part of the Department” by filing the request for

review “with the AHC within 60 days of the date you were sent the notice of additional assessment by the Department.” *Id.*

7. On November 19, 2014, New Garden’s complaint was filed with this Commission. The November 19, 2014 filing includes a complaint dated October 24, 2014, addressed to “Sales Tax Processing” within the Department, and several exhibits. Two fax transmission sheets are attached to the complaint: one dated October 24, 2014, addressed to Sales Tax Processing, at (573) 522-1160, and another dated November 12, 2014, addressed to Administrative Hearing Commission, at (573) 751-7175.

8. This Commission’s fax number is (573) 751-5018.

9. Sixty days after the date of mailing of the assessments (September 5, 2014) was November 4, 2014.

### **Conclusions of Law**

Section 621.050.1<sup>2</sup> provides that we have jurisdiction to hear a complaint appealing an assessment, but “such petition must be filed within sixty days after the mailing or delivery of such decision, whichever is earlier.” Section 144.261.

The Director mailed the sales tax assessments on September 5, 2014. New Garden filed its appeal with this Commission on November 19, 2014 – over two weeks past the 60-day deadline for appealing the assessments. We lack authority to hear an appeal filed out of time. *Community Fed. Sav. & Loan Assoc. v. Director of Revenue*, 752 S.W.2d 794, 799 (Mo. banc), *cert. denied*, 488 U.S. 893 (1988).

New Garden’s response to the Director’s motion is accompanied by three affidavits. New Garden’s owner and accountant swear they did not timely receive the assessments. But the appeal time prescribed by § 144.261 runs from the Director’s mailing of the assessments,

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<sup>2</sup>Statutory references are to RSMo 2000 unless otherwise indicated.

which she proved, rather than the taxpayer's receipt thereof. Furthermore, the Director mailed the assessments to the same address she has always used to contact New Garden, and we see no evidence of any error or intention to mislead in her procedures.

In addition, New Garden's attorney states that she had numerous conversations with representatives of the Department of Revenue, who told her that the 60-day appeal time would not start to run until New Garden actually received the assessments, and that she filed her appeal per instructions of a Department representative by faxing it to (573) 522-1160. The attorney also states she checked on the status of the appeal by calling a Department representative on December 12, 2014, and was subsequently told to file the appeal with the Administrative Hearing Commission at (573) 751-7175. In other words, New Garden makes an estoppel argument against the Director. But our authority to decide a case cannot be conferred by estoppel. *See State Tax Commission v. Administrative Hearing Commission*, 641 S.W.2d 69, 72 (Mo. banc 1982). Even if Department representatives gave mistaken advice to the attorney, "a governmental officer's misinterpretation of the law does not afford those dealing with the officer any relief, through estoppel or otherwise." *Department of Social Services v. Mellas*, 220 S.W.3d 778, 782 (Mo. App. W.D., 2007).

In its motion to extend the time for filing its appeal, New Garden argues that *Community Federal Savings & Loan* has been superseded and overruled by our adoption of 1 CSR 15-3.230, a procedural rule of this Commission by which we may extend time limits "set by these rules or orders of the commission." The 60-day limit for filing an appeal from a final decision of the Director is set by statute, not by our rules. Our rules, therefore, cannot change that time limitation. *See Union Electric Co. v. Director of Revenue*, 425 S.W.3d 118, 124-25 (Mo. banc 2014) (regulations of a state agency are invalid if they are beyond the scope of authority conferred upon the agency, or if they attempt to expand or modify statutes).

Therefore, we have no choice but to deny New Garden’s motion to extend the time set by § 144.261.

“[A]dministrative agencies—legislative creations—possess only those powers expressly conferred or necessarily implied by statute.” *United Pharmacal Co. of Mo., Inc. v. Mo. Bd. of Pharmacy*, 208 S.W.3d 907, 913 (Mo. banc 2006) (internal quotation omitted). Thus, our authority to act comes from the statutes alone. The fact that New Garden’s appeal was not timely filed deprives us of authority to decide that appeal. If we lack authority to hear a complaint, we can take no action other than to exercise our inherent power to dismiss it. *State Bd. of Registration for Healing Arts v. Draper*, 280 S.W.3d 134, 136 (Mo. App., E.D., 2009). Accordingly, we grant the Director’s motion.

#### **Summary**

We grant the motion to dismiss New Garden’s complaint.

SO ORDERED on February 27, 2015.

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KAREN A. WINN  
Commissioner